88-1196

No.

Supreme Court, U.S.
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JAN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

January Term, 1989

BRYAN K. GOREE, MICHAEL GOREE, MICHAEL L. PATTERSON, DARLENE ROBINSON, SAMUEL ROBINSON, KAREN ROBINSON, DONOVAN WALLACE, and MICHAEL N. COURTNEY,

Petitioners,

v.

MICHAEL E. LAVELLE, JAMES R. NOLAN, and CORNEAL A. DAVIS, as members of the Chicago Board of Election Commissioners, the CHICAGO BOARD OF ELECTION COMMISSIONERS, and the CITY OF CHICAGO, a municipal corporation,

Respondents,

and

HARRY A. CAGE, JR.,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTION PRESENTED

Whether an election on a local option referendum violates constitutional rights of freedom of association and due process where:

(i) the election was held on the premises of a principal and active supporters of the referendum proposition, the polling place having been changed to that location shortly before the election;

(ii) notices of election placed in the precinct indicated that transportation to the polling place could be arranged by calling the business telephone number of supporter of the proposition in whose establishment the polling place was located;

(iii) prior to the election, meetings were held at such establishment/polling place, sponsored by those seeking passage of the referendum proposition; and

(iv) on the day of the election, proponents of the referendum proposition (including representatives of the establishment in which the polling place was located) repeatedly and continuously engaged in electioneering and soliciting of votes in favor of the proposition, and otherwise engaged in political discussion in favor of the proposition within the polling place and within 100 feet thereof in violation of Illinois election law.

PARTIES TO THE PROCEEDING

Petitoners, Bryan K. Goree, Michael Goree, Michael L. Patterson, Darlene Robinson, Samuel Robinson, Karen Robinson, Donovan Wallace, and Michael N. Courtney are all registered of the 2nd Precinct of the 5th Ward of the City of Chicago. They brought this action challenging the conduct of an election on a local-option referendum held in their precinct.

Respondents, Michael E. Lavelle, James R. Nolan, and Corneal A. Davis are (or were at the time that this action was filed) members of the Chicago Board of Election Commissioners, which administers elections within the City of Chicago. Respondent, the City of Chicago, is an Illinois municipal corporation.

Harry A. Cage, Jr., is also a registered voter of the 2nd Precint of the 5th Ward of the City of Chicago. He requested, and was granted, leave to intervene as a respondent in the trial court in support of the challenged referendum.

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Section 17-29 of the Illinois Election Code (Ch. 46, §17-29, Ill.Rev.Stat.) 5, 8

Section 9-1, *et. seq.*, of the Illinois Liquor Control Act (Ch. 43, §167, Ill.Rev.Stat.) 2, 7

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No.

In The
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BRYAN K. GOREE, MICHAEL GOREE, MICHAEL L. PATTERSON, DARLENE ROBINSON, SAMUEL ROBINSON, KAREN ROBINSON, DONOVAN WALLACE, and MICHAEL N. COURTNEY,

Petitioners,

v.

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Respondents,

and

HARRY A. CAGE, JR.,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioners, Bryan K. Goree, Michael Goree, Michael L. Patterson, Darlene Robinson, Samuel Robinson,

Karen Robinson, Donovan Wallace, and Michael N. Courtney, petition for a writ of certiorari to review the judgment of the Illinois Supreme Court, the highest court of the state of Illinois, in this case.

OPINIONS BELOW

The original opinion of the Circuit Court of Cook County (App., *infra*, C1-C2, D1) is unreported. The opinion of the Illinois Appellate Court (App., *infra*, B1-B7) is reported at 169 Ill.App.3d 696, 523 N.E.2d 1078, 120 Ill.Dec. 167 (1st Dist. 1988). The Order of the Illinois Supreme Court denying leave to appeal (App., *infra*, A1) is unreported.

JURISDICTION

The order of the Illinois Supreme Court was entered on October 6, 1988. (App., *infra*, A1). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTORY PROVISIONS INVOLVED

Section 17-29 of the Illinois Election Code (Ch. 46, §17-29, Ill.Rev.Stat.), Section 9-2 of the Illinois Liquor Control Act (Ch. 43, §167, Ill.Rev.Stat.), and Article 3, Section 3, Illinois Constitution (1970) are reprinted at App., *infra*, G1-G4.

STATEMENT OF THE CASE

This is an election case. The election at issue was held under the provisions of Illinois statute (Ch. 43, §9-1, et seq., Ill.Rev.Stat.) which allow the voters of municipalities (or of individual precincts in cities or towns of 200,000 or more people) to determine by referendum whether the sale at retail of alcoholic beverages shall be prohibited within their boundaries.

On November 4, 1986, an election was held in 2nd Precinct of the 5th Ward of the City of Chicago at which the following question was submitted to the voters of that precinct:

> Shall the sale at retail of alcoholic liquor be prohibited in this 2nd Precinct of the 5th Ward of the City of Chicago?
>
> (hereinafter "the referendum proposition")
> [R. C2, C7, C36, C41]

The canvass of returns in connection with the referendum proposition was held on November 12, 1986. [523 N.E.2d at 1080, 120 Ill.Dec. at 169; R. C52.] The canvass indicated the passage of the referendum proposition by a vote of 227 to 62. [523 N.E.2d at 1080, 120 Ill.Dec. at 169.]

On November 21, 1986, petitioners, all registered voters of the 2nd Precinct of the 5th Ward in the City of Chicago, brought this action challenging the conduct of the election held on the referendum proposition. [523 N.E.2d at 1080, 120 Ill.Dec. at 169.] In their petition of election contest, these voters alleged that:

(1) Shortly before the election, the polling place for holding the election was changed to Cage Memorial Chapel, located at 7651 S. Jeffrey Ave., Chicago, Illinois (since the referendum proposition involved only a single precinct, all votes on the proposition were cast at this location).

(2) Notices of election placed in the precinct indicated that transportation to the polling place could be arranged by calling the business telephone number of Cage Memorial Chapel.

(3) Prior to the election, meetings were held at Cage Memorial Chapel concerning the referendum proposition. The meetings were sponsored by those seeking passage of the referendum proposition. Such meetings were held on October 21 and October 30, 1986 (the latter date being only five days before the election), and possibly on other dates. [*See*, "Petition of Election Contest," par. 3; R. C3.]

(4) During the November 4, 1986, election, proponents of the proposition repeatedly and continuously engaged in electioneering and soliciting of votes in favor of the proposition, and otherwise engaged in political discussion in favor of the proposition within the polling place and within 100 feet thereof in violation of Illinois election law. Some of those who engaged in such conduct were representatives of Cage Memorial Chapel.[1]

The petition of election contest was supported by the affidavits of each of the petitioners setting forth the circumstances under which they had each been approached and solicited to vote in favor of the proposition. [523 N.E.2d at 1080, 120 Ill.Dec. at 169; R. C8-14.] It was also supported by the affidavit of William L. Owens, a poll watcher, who indicated that he had been present at the polling place throughout the course of election day, that he had observed various individuals lobbying in support of the referendum proposition (both inside the polling place itself and within 100 feet of the polling place). [Affidavit of William L. Owens; R. C15.]

After this action was filed below, Harry A. Cage, Jr., also a registered voter of the 2nd Precinct of the 5th Ward, requested and was granted leave to intervene as a respondent in support of the challenged referendum. [523 N.E.2d at 1080, 120 Ill.Dec. at 169; at 3; R. C61.] Intervenor Cage moved to strike and dismiss the petition of election contest. [523 N.E.2d at 1080, 120 Ill.Dec. at 169; at 3; R. C59-60.] No affidavits contravening the facts set forth in petitioners' affidavits were submitted by Intervenor Cage. None of the other respondents filed any responsive pleadings in the trial court.

---

[1] All of the foregoing is undisputed for the purposes of this proceeding, since the case was decided in the trial court of a motion to dismiss. [523 N.E.2d at 1080, 120 Ill.Dec. at 169; Order of January 16, 1987, R. C80.]

Although Illinois law contains the following provisions,

> No . . . person shall . . . do any electioneering or solicitation of votes or engage in any political discussions within any polling place or within 100 feet of any polling place . . .
>
> Section 17-29 of The Election Code (Ch. 46, §17-29, Ill.Rev.Stat.)

> All elections shall be free and equal.
>
> Article 3, Section 3, Illinois Constitution (1970)

the trial court (on January 16, 1987) granted Intervenor's motion to strike and dismiss, denied petitioner's request for leave to file an amended petition of election contest, and dismissed the case with prejudice. [523 N.E.2d at 1080, 120 Ill.Dec. at 169; R. C80.] In its ruling, the trial court did not address constitutional issues [R. 25-28], although raised [R. 14-15, 25]. The Illinois Appellate Court affirmed, by written opinion dated April 29, 1988, concluding that "[t]he election did not violate constitutional rights" [523 N.E.2d at 1080, 120 Ill.Dec. at 169] and that "[f]ree and equal election in America does not require a 'simon pure' election, free of 'dirty tricks' " [*ibid.*]. A petition for rehearing was denied by the Illinois Appellate Court on June 6, 1988. A "Petition for Leave to Appeal" was filed in the Illinois Supreme Court, also raising the issues of whether the activities alleged favored one group over another or created an unequal burden on the right to cast votes in violation of constitutional protections. ["Petition for Leave to Appeal," at 4-5, 19-20.] The Illinois Supreme Court declined to accept the case for review on October 6, 1988.

REASONS FOR GRANTING THE PETITION

The decision of the Illinois courts reflects an inappropriate view of constitutional protections as applied to our system of electoral government and, if allowed to stand, will set a harmful precedent. The Illinois court's conclusion that "[f]ree and equal election in America does not require a 'simon pure' election, free of 'dirty tricks' " [523 N.E.2d at 1080, 120 Ill.Dec. at 169] will not serve to safeguard our electoral system, but rather will invite unfair and unequal elections. If (as alleged here) one group or faction or side can take control of the polls, then we invite the kind of non-democratic "elections" that we read about as having taken place in other countries. Review by this Court is clearly warranted.

2. At stake here is the effective right to vote, a corollary of the constitutional right of freedom of association under the First Amendment, made applicable on the states through the Fourteenth Amendment:

> Neither the right to be a candidate (*Bullock v. Carter*, 405 U.S. 134, 142-43, 92 S.Ct. 849, 855-56, 31 L.Ed.2d 92 (1972)) nor even to vote (*Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9, 102 S.Ct. 2194, 2199, 72 L.Ed.2d 628 (1982)) is a fundamental constitutional right. But voting serves directly one of the most fundamental rights in a democratic society: that of freedom of association. *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973); *Lubin v. Panish*, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974).
>
> *Foster v. Kusper*, 587 F.Supp. 1194 (N.D.Ill. 1984)

3. The right to fairly and honestly conducted elections is constitutionally protected:

> The situation here involved . . . is one involving *basic constitutional principles* violated by elections which are not *fairly and honestly conducted.* To paraphrase the words of Mr. Justice Frank-

> furter in Offut v. United States, 348 U.S. 11, 14 [75 S.Ct. 11, 99 L.Ed. 11] (1954), *elections must not only be honestly and fairly conducted but must also give that appearance.*
>
> *Moore v. Kusper*, 465 F.2d 256, 258 (7th Cir. 1972) (emphasis added)

> Although the United States Constitution confers no right to vote as such, it does guarantee to every citizen the *right to participate on a fair and equal basis* with all other citizens in the electoral process once a state has chosen to select its public officials by popular vote. * * * The right to vote is federally protected because it is "preservative of other basic civil and political rights. . . ." [*Reynolds v. Sims*, 377 U.S. 533,] at 562, 84 S.Ct. [1362,] at 1381, [12 L.Ed.2d 506 (1964)].
>
> *Duncan v. Poythress*, 515 F.Supp. 327, 336 (N.D.Ga. 1981), *affirmed*, 657 F.2d 691 (5th Cir. 1981), *rehearing denied*, 664 F.2d 291 (5th Cir. 1981), *cert. granted*, 455 U.S. 937, 102 S.Ct. 1426, 71 L.Ed.2d 647 (1982), *cert. dismissed*, 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed.2d 504 (1982) (emphasis added)

> If the right [to vote] is denied altogether or abridged in a manner which renders the electoral process fundamentally unfair, a violation of due process may be found. If, on the other hand, the state discriminates in favor of some members of the electorate and against others, the equal protection guarantee may have been violated.
>
> *Id.*, at 337

The decision of the Illinois courts ignores these principles.

4. This case involves an election under Illinois' local-option system, which allows voters to vote on the question of whether to ban the retail sale of alcoholic beverages (*see*, Ch. 43, §9-1, *et seq.*, Ill.Rev.Stat.). The Seventh Circuit has upheld that system (against a challenge that its operation would deprive liquor licensees of their property without

due process of law), but it did so with reservations:

> We conclude that although the small size of the Chicago precincts creates an opportunity for abuse, the danger is not so great as to make the local option feature of Illinois' law unconstitutional.
>
> * * *
>
> In holding that the referendum is a constitutionally permissible method of regulating the local sale of liquor, we *assume* that the referendum is conducted *fairly and honestly*.
>
> *Philly's, Inc. v. Byrne*, 732 F.2d 87, 93-94 (7th Cir. 1984) (emphasis added)

Although this case presents precisely the constitutional issue which the Seventh Circuit reserved in *Philly's, Inc. v. Byrne* (for it is undisputed on this record that the referendum here was not fairly and honestly conducted), the Illinois courts declined to address the issue.

5. The decision below conflicts with the decision of the U.S. District Court for the Northern District of Illinois in *Flamm v. Kusper*, 384 F.Supp. 1364 (N.D.Ill. 1974), *vacated and remanded*, 525 F.2d 695 (7th Cir. 1975). In *Flamm*, the District Court addressed Section 17-29 of The Election Code[2] (Ch. 46, §17-29, Ill.Rev.Stat.), the same Illinois statute involved here. *Flamm* involved a challenge to the conduct of a county clerk, who was on the ballot for re-election, in affixing his name to certain official posters for delivery to or use at the polling places. In granting an injunction requiring the removal of the county clerk's name from such posters, the District Court indicated:

---

[2] Section 17-29 of the Election Code provides, in pertinent part, as follows:

> No...person shall ...do any electioneering or solicitation of votes or engage in any political discussions within any polling place or within 100 feet of any polling place ...

> The court also finds that the use of Stanley T. Kusper's name as hereinabove set forth does in fact give to him an *unfair advantage* over Lola Flamm because of the frequent repetition of his name in bold type on posters in and near the polling places at the expense of the taxpayers of Cook County and without giving Lola Flamm's name the same publicity.
>
> The court further concludes that this may very well influence some uncommitted voters to vote for Stanley T. Kusper and that it would be a *subtle form of electioneering* within 100 feet of a polling place and in polling places contrary to Section 17-29 of the Illinois Election Code, Ill.Rev.Stats., 1973, Ch. 46, §17-29.
>
> 384 F.Supp. at 1366-1367 (emphasis added)

In the instant case, the Illinois courts did not conclude that this statutory provision, §17-29, had *not* been violated, but rather that "the provisions of the election code relating to electioneering within or near the polling place [are] directory only with respect to a referendum election and not serious enough to void the election" (523 N.E.2d at 1080-81; 120 Ill.Dec. at 169-170). That conclusion, the logical implication of which is that violations of this provision of Illinois statute can never rise to a level of constitutional violation, cannot be reconciled with the grant of relief in *Flamm*.

And, in contrast to *Flamm*, there is nothing subtle about the electioneering which occurred here. Here, "campaign meetings" were held at the business establishment of a supporter of the referendum proposition, at least one of which was only five days before the election date. [523 N.E.2d at 1080, 120 Ill.Dec. at 169; "Petition of Election Contest," par. 3; R. C3.] The precinct polling place was changed to that same location. [523 N.E.2d at 1080, 120 Ill.Dec. at 169; "Petition of Election Contest," par. 4; R. C3.] Notices of election placed in the precinct indicated that transportation to the polling place could be arranged

by calling the business telephone number of the supporter of the proposition to whose premises the polling place had been moved. [523 N.E.2d at 1080, 120 Ill.Dec. at 169; R. C7, C41.] On election day itself, proponents of the referendum proposition, including representatives of the business establishment in which the polling place was located, repeatedly and systematically engaged in electioneering and solicitation of votes in and about the polling place in violation of the election laws. [523 N.E.2d at 1080, 120 Ill.Dec. at 169; "Petition of Election Contest," par. 5; R. C3.] If the conduct in *Flamm* was sufficient to justify federal constitutional relief, then the conduct at issue here certainly warrants such relief.

6. The decision below also conflicts with the result in two Seventh Circuit cases, *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909, 91 S.Ct. 1383, 28 L.Ed.2d 650 (1971), and *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973).

Shakman, like this case, dealt with attempts to influence voters – there, by the wielding of patronage pressure; here, by electioneering pressure. The Seventh Circuit noted:

> The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, *political effort in favor of the ins and against the outs*. We conclude that *these interests are entitled to constitutional protection* from injury of the nature alleged as well as from injury resulting from inequality in election procedure.
>
> 435 F.2d at 270 (emphasis added)

Similarly, in *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), the Seventh Circuit upheld (as a matter of pleading) a complaint which alleged that a candidate in a primary election for state senator who withdrew after winning the primary was a sham or stand-in candidate. The *Smith*

court determined that such conduct, if proved, may have enabled the replacement candidate to win an election (the primary) he could not have won had he been on the ballot, may have caused the defeat of the unsuccessful primary candidate, and may have "denied [certain voters] an equal opportunity to win votes" (489 F.2d at 1102) and caused such voters to have "suffered an unequal burden on their right 'to cast their votes effectively' " (*Ibid.*). Citing *Shakman*, the Seventh Circuit concluded that the sham candidacy "worked 'in favor of the ins and against the outs.' " [*Ibid.*]

The conduct in this case rises to a constitutional level because it involves organized and concerted activity by which a *group* has sought to (and has) obtained an advantage over its adversaries. That kind of activity does not comport with our constitutional framework and system of representative government.

7. The decision below is also inconsistent with the commentators (although old ones). Regarding the effect of unfair electioneering and control of the polling place, *see, e.g.*, Paine, "A Treatise on the Law of Elections to Public Offices," Little, Brown, and Company (1890), at 395:

> The fear of social ostracism, or religious persecution, if brought to bear upon the great body of voters so generally as to affect the result, will invalidate the election.

McCrary, "A Treatise on the Law of Elections," R.B. Ogden, Publisher (1875), Sec. 443:

> . . . the admission of such persons is decidedly improper, especially if the persons admitted be the partisans of any particular candidate or ticket, and the fact of their presence or misconduct may be shown as circumstances tending to invalidate the return.

8. The Illinois court's avoidance of the constitutional issues on the ground that "[a]ll that the constitution requires is that each voter have the right and opportunity

to cast his or her vote without any restraint and that his or her vote has the same influence as the vote of any other voter" (523 N.E.2d at 1080; 120 Ill.Dec. at 169) represents an inappropriately narrow view of constitutional protections on the right to vote. This alone justifies this Court's review. The decision below, if allowed to stand, will serve to encourage not only electioneering but other violations of election laws. If the kind of organized and concerted activity alleged to have occurred here can be undertaken without fear that the result sought to be obtained by it will be overturned, then similar activity may be undertaken in a contest for elective office.

What is at stake here is the integrity of our system of democratic government. The decision below will not serve to safeguard the integrity of that system, but, to the contrary, will threaten it.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

67324

ILLINOIS SUPREME COURT
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October 6, 1988

Mr. Gary A. Weintraub
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614 West Monroe Street
Chicago, IL 60606

No. 67324 - Bryan K. Goree, et al., petitioners, v. Michael E. Lavelle, et al., etc., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1988.

APPENDIX B

GOREE v. LaVELLE

Cite as 120 Ill.Dec. 167, 523 N.E.2d 1078 (Ill.App. 1 Dist. 1988)

169 Ill.App.3d 696
523 N.E.2d 1078

BRYAN K. GOREE, MICHAEL GOREE, MICHAEL L. PATTERSON, DARLENE ROBINSON, SAMUEL ROBINSON, KAREN ROBINSON, DONOVAN WALLACE, and MICHAEL N. COURTNEY,

Petitioners-Appellants,

v.

MICHAEL E. LAVELLE, JAMES R. NOLAN, and CORNEAL A. DAVIS, as members of the Chicago Board of Election Commissioners, the CHICAGO BOARD OF ELECTION COMMISSIONERS, and the CITY OF CHICAGO, a municipal corporation,

Respondents-Appellees,

and

HARRY A. CAGE, JR.,

Intervenor-Respondent-Appellee.

No. 87-0476.

Appellate Court of Illinois,
First District, Fifth Division

April 29, 1988.

Rehearing Denied June 3, 1988.

Voters filed petition seeking to have local option election voided. The Circuit Court, Cook County, Francis Barth, J., dismissed with prejudice, and voters appealed. The Appellate Court, Murray, J., held that: (1) voters failed to establish that election resulting in passage of proposition

barring retail sale of alcoholic liquor in precinct was not free and equal in violation of State Constitution, despite change in place of election to chapel, holding of meetings at chapel sponsored by those seeking passage of proposition, and alleged illegal electioneering, and (2) trial court cannot void election for violations of directory provisions of election code.

Affirmed.

1. **Elections 10 1/2**

State constitutional provision relating to free and equal election does not guarantee errorless elections; all that Constitution requires is that each voter have right and opportunity to cast vote without any restraint and that vote have same influence as vote of any other voter. S.H.A. Const. Art. 3, § 3.

2. **Intoxicating Liquors 37**

Voters failed to establish that election resulting in passage of proposition barring retail sale of alcoholic liquor in precinct was not free and equal in violation of State Constitution, despite change in place of election to chapel, holding of meetings at chapel sponsored by those seeking passage of proposition, and alleged illegal electioneering within 100 feet of polling place; vote was 227 for proposition and 62 against. S.H.A. Const. Art. 3, § 3.

3. **Elections 227(1)**

Provisions of election code relating to electioneering within or near polling place are directory only with respect to referendum election and not serious enough to void election. S. H. A. ch. 110, ¶ 2-615.

4. **Elections 227(1)**

Trial court cannot void election for violations of directory provisions of election code; irregularities complained of after election must be of such magnitude that, if proved, would show that but for irregularities election result would have been different, or that, if proved, irregularities would

impose duty on court to void election. S.H.A. ch. 110, ¶ 2-615.

5. Intoxicating Liquors 37

Voters failed to establish that alleged violations of election code, including electioneering within or near polling place, would have changed result of election on referendum proposition barring retail sale of liquor in precinct, and thus failed to establish that alleged violations required that election be voided; election results were 227 voters in support of proposition and 62 against. S.H.A. ch. 110, ¶ 2-615.

6. Elections 296

Pleadings in election contest that charge violations of directory provisions of election code rather than mandatory provisions without alleging that violations were fraudulent are subject to dismissal. S.H.A. ch. 110, ¶ 2-615.

7. Intoxicating Liquors 37

Complaints concerning illegal electioneering in and about chapel polling place on day of election on referendum proposition, which complaints did not indicate that any voter was threatened, paid, or otherwise interfered within casting of ballot, created at best inference of fraud, rather than pleading fraud specifically, thus requiring dismissal of election contest petition.

8. Fraud 50

Pleading 18

In Illinois, fraud is never presumed, but must be pleaded with specificality and pleading must apprise opposing parties of what they are called to answer.

9. Intoxicating Liquors 37

Trial Court dismissal of election contest challenging passage of local option referendum was required to be with prejudice and without leave to amend; petitioners asserted no fraudulent conduct in election and did not move for

leave to amend or move for reconsideration. S.H.A. ch. 110, ¶ 2-615.

Gary A. Weintraub, Chicago, for petitioners-appellants.

Daniel P. Madden, Chicago, for intervenor-respondent-appellee.

Michael Levinson, Chicago, for certain respondents-appellees.

Justice MURRAY delivered the opinion of the court:

This is an appeal by Bryan K. Goree and seven other voters (petitioners) of the 2nd precinct of the 5th ward of the city of Chicago from an order of a trial court denying petitioners' petition seeking to have a November 4, 1986, local option election set aside and voided.

On November 4, 1986, a referendum concerning the sale of alcoholic liquor at retail in the 2nd precinct of the 5th ward was conducted. The proposition put to the voters of the precinct was:

> "Shall the sale at retail of alcoholic liquor be prohibited in the Second Precinct of the Fifth Ward of the City of Chicago."

On November 12, 1986, a canvas of the election return concerning the proposition was made. The canvas disclosed a vote of 227 voters in support of the proposition and 62 against it. On November 21, 1986, the petitioners, all registered voters of the 2nd precinct of the 5th ward, petitioned the trial court for a voiding of the election. The petition supported by affidavits alleged the following irregularities in the conduct of the election:

> (1) Shortly before the election the polling place for the holding of the election was changed to the Cage Memorial Chapel located at 7651 S. Jeffrey Ave., Chicago, Illinois.

(2) Notices of the election placed in the precinct indicated transportation to the chapel would be afforded by calling telephone No. 721-8900, the number of the Cage Chapel.

(3) Prior to the election, meetings were held in the Cage Memorial Chapel concerning the proposition. The meetings were sponsored by those seeking passage of the referendum proposition.

(4) During the November 4, 1986, election proponents of the proposition engaged in illegal electioneering within the polling place and 100 feet thereof in violation of Illinois Election Law. Some of those engaged in the illegal electioneering were representatives of the chapel.

Harry A. Cage, Jr., intervened in the cause and filed a motion to strike and dismiss the petition. On January 16, 1987, the trial court granted the intervenor's motion to strike, dismissed the cause with prejudice and denied plaintiffs' request to amend their petition. The petitioners have appealed the order.

On appeal petitioners argued that the trial court erred in allowing the motion to strike and dismiss and, in denying their request to amend their pleadings, they base this argument on charges; (1) that the election of November 4, 1986, was "not free and equal in violation of Article 3, section 3" as guaranteed by the Illinois Constitution of 1970; (2) that their petition contains allegations indicating that the complained of activities were fraudulent; and (3) that the trial court erred in denying their request to amend their pleadings.

We reject the petitioners' contentions and charges and affirm the trial court.

[1] First, with respect to plaintiffs' contention that the election was not free and equal and violated petitioners' right to a free and equal election, this charge lacks merit.

The constitutional provision relating to a free and equal election (art. 3, sec. 3 of the Ill. Const.) does not guarantee an errorless election. All that the constitution requires is that each voter have the right and opportunity to cast his or her vote without any restraint and that his or her vote has the same influence as the vote of any other voter. *People v. Deatherage* (1948), 401 Ill. 25, 37, 81 N.E.2d 581.

[2] There is nothing in the record, briefs and argument that discloses that any voter in the 2nd precinct of the 5th ward did not know of the election, was denied the right to vote, suffered any restraint or whose vote had not the same influence as any other voter voting on the proposition. The vote was 227 for the proposition and 62 against. This is a substantial vote in a precinct which ranks among the smallest election districts in the State. Thirty-three (33%) percent of the vote which was cast against the proposition is a percentage many of our presidential candidates claim victory with in State primaries. Free and equal election in America does not require a "simon pure" election, free of "dirty tricks". All that is required appears to have been met in the November 4, 1986, election in the 2nd precinct when John Barleycorn was buried in Cage's Memorial Chapel. The election did not violate constitutional rights.

With respect to petitioners' charges of fraud, the court on this record must reject those charges. The most serious of the charges in petitioners' petition is the charge that the election was tainted with electioneering tactics prohibited by the Illinois Election Code. (Ill.Rev.Stat.1985, ch. 46, par. 17-29.) This court has held the provisions of the election code relating to electioneering within or near the polling place to be directory only with respect to a referendum election and not serious enough to void the election. *Thomas v. Marcin* (1977), 51 Ill.App.3d 82, 9 Ill.Dec. 159, 366 N.E.2d 416.

[3, 4] This court also has held that some other provisions of the election code are directory. A trial court cannot void an election for violations of such provisions of the election code. The irregularities complained of after an election must be of such magnitude that, if proved, would show that but for the irregularities, the election result would have been different, or that if the irregularities were proved, would impose a duty on a court to void the election. (*McCaslin v. Moore* (1966), 67 Ill.App.2d 355, 214 N.E.2d 18.) Petitioners' petition falls short of this requirement.

[5] Finally, on this matter, pleadings in an election contest that charge violations of directory provisions of the election code rather than mandatory provisions without alleging that the violations were fraudulent, are subject to dismissal. *Cummings v. Marcin* (1973), 16 Ill.App.3d 18, 305 N.E.2d 606.

[6] Petitioners appear to recognize this principle by bolstering their charge of illegal election activities with allegations concerning the change of the polling place to the chapel, notices that free transportation would be given by telephone to the chapel, preelection meetings by proponents in the chapel, and election day electioneering in and within 100 feet of the chapel in which the chapel representatives participated. Yet, nowhere does the petition allege that the polling place was fraudulently moved to the chapel, that potential voters who attended the preelection meeting were threatened if they did not vote for the proposition, paid to vote for the proposition, or otherwise influenced in a fraudulent manner.

[7, 8] The complaints concerning illegal electioneering in and about the chapel polling place on the election day does not indicate that any voter was threatened or paid for his or her votes of otherwise interferred with in casting their ballot. At best, the allegation creates an inference of fraud. Yet, fraud in Illinois is never presumed, it must be pleaded. (*Candlewick Lake Utilities Co. v. Quinones* (1980),

82 Ill.App.3d 98, 37 Ill.Dec. 479, 402 N.E.2d 369.) It must be pleaded with specificality and must apprise the opposite party of what they are called to answer. *Zickur v. Irmiger* (1973), 15 Ill.App.3d 805, 304 N.E.2d 635.

Judged by these rather rigid pleading standards, the petitioners' petition must fail and the trial court properly dismissed it as a matter of law. The complaint does not allege fraud, at best, it alleges aggressive electioneering on an issue apparently important to the people of the 2nd precinct in the 5th ward.

[9] In their final point, the petitioners suggest error in dismissing the action with prejudice and denying them leave to amend. Intervenor's motion to strike merely asserted that petitioners petition was insufficient as a matter of law. It was a non-factual motion filed pursuant to section 2-615 of the Illinois Civil Practice Act. (Ill.Rev. Stat.1985, ch. 110, par. 2-615.) Under our rules of procedure, pleadings are to be liberally construed with a view of doing substantial justice. (*Bilderback v. Trico Community Unit School District No. 176* (1973), 11 Ill.App.3d 928, 297 N.E.2d 26.) The petition striken as indicated asserted no fraudulent conduct in the election. Had petitioners asserted either by way of a motion for leave to amend or motion for reconsideration, facts indicating or even inferring fraud, the trial court under our pleading practice would have no doubt allowed petitioners to amend their pleadings. They did not. Nor do they make allegations in this court suggesting fraud by the respondents or intervenor. In such situation, the trial court had no alternative but to dismiss the case with prejudice and deny leave to amend nor do we have any alternative but to affirm the trial court. Accordingly, the trial court is affirmed.

AFFIRMED.

LORENZ, P.J., and SULLIVAN, J., concur.

APPENDIX C

THE COURT: Thank you very much, gentlemen.

This is, as Mr. Madden suggested, an action brought not really to contest the election and however, have the Court take another look at the results, but actually asks the Court to void the election. It is a request then for, I would characterize it as, extraordinary relief.

I have reviewed the petition and the briefs on file and considered the arguments presented this morning. And I remain after argument the same, or I have the feeling that I should adhere to what was my initial impression when I reviewed this, that Thomas v. Marcin does control here. And I have not been persuaded otherwise notwithstanding the vigorous argument and well-written brief presented by Mr. Weintraub.

I note that Mr. Weintraub relies on Simmons v. Devoy's (phonetic) authority with regard to the question of whether a statute would be deemed mandatory under the circumstances there of how it should be construed. I feel that that case clearly is different in that it construed a different section of the election code, and that the Thomas Court had occasion to deal with the precise provisions of the code that we are talking about today in an identical type of proceeding.

I feel that the Petitioner here did have a responsibility to demonstrate in their pleading fraud with regard to the particular provision of the Code in order for a contest in that regard to stand. And also that goes to the question of the change of the polling place. There simply are bare allegations that these events took place, but I see no fraud. I can construe or construct no fraud from that, from those bare assertions.

I am of the belief that courts should not easily be drawn into redeciding political issues. And I can't come away from this proceeding without the feeling that there is a desire to redecide a political issue in another forum which issue has been determined by the people; therefore,

I'm going to deny the petition. I'm also going to deny an opportunity to refile because I do accept the argument that the Petitioners in an election contest have a heavy burden to present their case in their pleading and not to be permitted the opportunity to repeatedly amend or to put their objections in a row and get them placed before the Court. And that it would be a mischief of first order to permit a delay in resolving these matters, these political issues once and for all by permitting the dilatory tactics, whether intentional or unintentional to frustrate the expressed will of the people in a given jurisdiction; so therefore, I'm going to deny your petition, Mr. Weintraub.

Mr. WEINTRAUB: And grant his motion?

THE COURT: Well, yes. I'm going to grant the motion and deny leave to amend or refile. * * *

APPENDIX D

D-1

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

GOREE, *et al.*,
Petitioners,
v.
LaVELLE, *et al.*,
Respondents,
and
CAGE,
Intervenor

No. 86 CO 305

ORDER

This cause coming on to be heard upon Intervenors motion to strike and dismiss, memoranda of law having been filed by the parties, argument of counsel having been heard, and the court being fully advised in the premises;

IT IS ORDERED:

1) Intervenor's motion to strike and dismiss is granted;
2) Leave to file amended petition is denied;
3) This cause is dismissed with prejudice;
4) This order is final and appealable;
5) The stay previously entered herein is extented pending the filing of a notice of appeal.

Atty No.	51431
Name	D.P. Madden
Attorney for	Intervenor
Address	109 N. Dearborn St.
City	Chicago, IL 60202
Telephone	853-0235

ENTER: FRANCIS BARTH
JAN 16 1987

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

APPENDIX E

E-1

IMPORTANT
SPECIAL 2ND PRECINCT MEETING

YOUR PRESENCE IS URGENTLY
NEEDED

TUES. OCT. 21st. 7:30 P.M.
CAGE MEMORIAL CHAPEL
7651 S. JEFFERY BLVD.

APPENDIX F

F-1

ATTENTION VOTERS

OF THE 2ND PRECINCT OF THE 5TH WARD

VOTE YES

On November 4th

TO THE QUESTION

"SHALL THE SALE AT RETAIL OF ALCOHOLIC LIQUOR BE PROHIBITED IN THIS 2ND PRECINCT OF THE FIFTH WARD OF THE CITY OF CHICAGO?"

BAN THE SALE OF LIQUOR IN THE 2ND PRECINCT

YOUR POLLING PLACE HAS BEEN CHANGED

THE NEW LOCATION IS:

CAGE MEMORIAL CHAPPEL
7651 S. Jeffery Blvd.

Sponsored by United Neighbors of the 2nd Precinct
If transportation is needed, call: 721-8900

APPENDIX G

17-29. Political activities within polling places

§ 17-29. No judge of election, pollwatcher, or other person shall, at any primary or election, do any electioneering or soliciting of votes or engage in any political discussion within any polling place or within 100 feet of any polling place; no person shall interrupt, hinder or oppose any voter while approaching within 100 feet of any polling place for the purpose of voting. Judges of election shall enforce the provisions of this Section.

Ch. 46, Sec. 17-29, Ill.Rev.Stat.

167. Referendum on retail sales of alcoholic liquor–Petition–Procedure

§ 9-2. When any legal voters of a precinct in any city, village or incorporated town of more than 200,000 inhabitants, as determined by the last preceding Federal census, desire to pass upon the question of whether the sale at retail of alcoholic liquor shall be prohibited in the precinct, they shall, at least 90 days before an election, file in the office of the clerk of such city, village or incorporated town, a petition directed to the clerk, containing the signatures of not less than 25% of the legal voters registered with the board of election commissioners or county clerk, as the case may be, from the precinct. The petition shall request that the proposition "Shall the sale at retail of alcoholic liquor be prohibited in .....?" be submitted to the voters of the precinct at the next ensuing election at which such proposition may be voted upon. The submission of the question to the voters of such precinct at such election shall be mandatory when the petition has been filed in proper form with the clerk. If more than one set of petitions are presented to the clerk for submission at the same election, setting forth the same or different propositions, the petition presented first shall be given preference and the clerk shall refuse to accept any other set of petitions. Notice of the filing of the petition and the result of the election shall be given to

the Secretary of State at his offices in both, Chicago and Springfield, Illinois. A return of the result of the election shall be made to the clerk of the city, village or incorporated town in which the precinct is located. If a majority of the voters voting upon such proposition vote "YES", the sale at retail of alcoholic liquor shall be prohibited in the precinct.

In cities, villages and incorporated towns of 200,000 or less population, as determined by the last preceding Federal census, the vote upon the question of prohibiting the sale at retail of alcoholic liquor, or alcoholic liquor other than beer containing not more than 4% of alcohol by volume, or alcoholic liquor containing more than 4% of alcohol by weight in the original package and not for consumption on the premises, shall be by the voters of the political subdivision as a unit. When any legal voters of such a city, village or incorporated town desire to pass upon the question of whether the sale at retail of alcoholic liquor shall be prohibited in the municipality, they shall, at least 90 days before an election, file in the office of the clerk of the municipality, a petition directed to the clerk, containing the signatures of not less than 25% of the legal voters registered with the board of election commissioners or county clerk, as the case may be, from the municipality. The petition shall request that the proposition, "Shall the sale at retail of alcoholic liquor be prohibited in .....?" be submitted to the voters of the municipality at the next ensuing election at which the proposition may be voted upon. The submission of the question to the voters of the municipality at such election shall be mandatory when the petition has been filed in proper form with the clerk. If more than one set of petitions are presented to the clerk for submission at the same election, setting forth the same or different propositions, the petition presented first shall be given preference and the clerk shall refuse to accept any other set of petitions. Notice of the filing of the petition and the result of the election shall be given to the Secretary of

State at his offices in both Chicago and Springfield, Illinois. A return of the result of the election shall be made to the clerk of the city, village or incorporated town. If a majority of the voters voting upon the proposition vote "Yes ", the sale at retail of alcoholic liquor shall be prohibited in the municipality.

In the event a municipality does not vote to prohibit the sale at retail of alcoholic liquor, the council or governing body shall ascertain and determine what portions of the municipality are predominantly residence districts. No license permitting the sale of alcoholic liquors shall be issued by the local liquor commissioner or licensing officer permitting the sale of alcoholic liquors at any place within the residence district so determined, unless the owner or owners of at least two-thirds of the frontage, 200 feet in each direction along the street and streets adjacent to the place of business for which a license is sought, file with the local liquor commissioner or licensing officer, his or their written consent to the use of such place for the sale of alcoholic liquors.

In each township or road district lying outside the corporate limits of a city, village or incorporated town, or in a part of a township or road district lying partly within and partly outside a city, village or incorporated town, the vote of such township, road district or part thereof, shall be as a unit. When any legal voters of any such township, or part thereof, in counties under township organization, or any legal voters of such road district or part thereof, in counties not under township organization, desire to vote upon the proposition as to whether the sale at retail of alcoholic liquor shall be prohibited in such township or road district or part thereof, they shall, at least 90 days before an election, file in the office of the township or road district clerk, of the township or road district within which the election is to be held, a petition directed to the clerk and containing the signatures of not less than 25% of the legal voters reg-

istered with the county clerk from such township or road district or part thereof. The submission of the question to the voters of the township, road district or part thereof, at the next ensuing election shall be mandatory when the petition has been filed in proper form with the clerk. If more than one set of petitions are presented to the clerk for submission at the same election, setting forth the same or different propositions, the petition presented first shall be given preference and the clerk shall refuse to accept any other set of petitions. A return of the result of such election shall be made to the clerk of the township or road district in which the territory is situated, and shall also be made to the Secretary of State at his offices in both Chicago and Springfield, Illinois.

Ch. 43, Sec. 167, Ill.Rev.Stat.

§ 3. Elections

All elections shall be free and equal.

Article 3, Section 3, Illinois Constitution (1970)